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No. 318

IN THE

Supreme Court of the United States

October Term, 1952

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

ROCKAWAY NEWS SUPPLY CO., INC.,
Respondent

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

ARTHUR J. GOLDBERG,
General Counsel,

ELLIOT BREDHOFF,
Assistant General Counsel.

CONGRESS OF INDUSTRIAL ORGANIZATIONS
718 Jackson Place, N. W.
Washington 6, D. C.

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CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of both parties to the filing of this brief has been filed with the Clerk.

INTEREST OF THE CIO

This case, which involves the refusal of an employee to cross a lawful picket line at the premises of an employer other than his own, is of direct and immediate concern not only to every CIO international and local union, but to every union in the American labor movement. Picketing, which is a necessary

and ever present concomitant of every strike, is one of the most fundamental and essential instruments of trade union operation. By establishing a picket line, a striking union strives to invoke the aid and cooperation, among others, of employees of firms which deal with the struck employer. The aid and cooperation thus sought is the refusal of such employees to cross the picket line thereby thwarting efforts of the struck employer to move goods or services in or out of the struck plant. In many instances concerted refusals by such employees to cross picket lines spell the difference between operation and non-operation of the struck plant for the duration of the strike.

If employees of secondary employers are to be subject to discharge for their refusal to cross a lawful picket line in the course of their duties, it is clear that many such employees will hesitate to observe the picket line and the effectiveness of the picket line will be seriously and substantially diminished. To that extent also will the striking union's chances for attainment of the objects of the strike be diminished. Virtually all trade unions are impelled on innumerable occasions to resort to the strike and picketing. These weapons are the lifeblood of the trade union movement. An adverse decision in the instant case will cut a vital artery and seriously hamper concerted activities of all trade unions.

QUESTION BEFORE THE COURT

Whether an employer violates Section 8(a)(1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross the lawful picket line of a labor organization other than his own at the premises of another company which supplies goods to the employer.

ARGUMENT

It is not our intention to repeat in this brief *amicus curiae* the exhaustive statutory and case analysis contained in the brief of the Board and in the other briefs *amicus*. Rather we will attempt to supplement the statements concerning the traditional nature of refusal to cross a picket line, and to develop

a few points regarding the statute and the applicable case law which perhaps are not directly touched upon elsewhere.[1]

Refusal to Cross a Picket Line as a Fundamental and Traditional Form of Union Concerted Activity

At this late date we do not believe it is necessary to dwell at any length on the proposition that refusal to cross a lawful picket line is one of the most sacred obligations attendant on union membership. Indeed this is so axiomatic and fundamental a proposition, and is so well known to the public at large, that a court properly may take judicial notice of this phenomenon.

Picketing is almost as old as the trade union movement itself. Down through the years employers bitterly opposed this trade union sanction, and they resorted to every conceivable method of economic warfare to crush picket lines. They also invoked the aid of the courts and state legislatures to make picketing illegal.

Despite these overwhelming obstacles, picketing survived and flourished and eventually came to be recognized as a bona fide trade union tactic. This was possible only because of the emphasis which trade unions placed on the necessity for observance of picket lines by their members, and on the cooperation which was forthcoming from the members.

As previously noted, picketing invariably accompanies a strike. It is also frequently employed in organizing campaigns at non-union plants, and in boycott campaigns against non-union employers or against employers who deal with non-union employers. Several different purposes may be served by such picketing. Among others, it is designed to inform and persuade employees of a struck employer to cease work, and to dissuade potential employees from aiding the employer by becoming strikebreakers. In addition it is used to inform and persuade employees of other employers, who deal with the struck employer, not to take goods in or out of the plant of the struck

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[1] For discussions of the instant case, see Note, *Refusals to Cross Picket Lines: Protection of Workers from Employer Reprisals*, 62 Yale L. J. 92 (December, 1952); 66 Harv. L. Rev. 363; 52 Col. L. Rev. 934.

employer. It is also a medium of informing and persuading the public at large, including other union members in their capacity as consumers, to refrain from patronizing the picketed employer.

The importance of these purposes varies with the circumstances. In some situations, such as a strike at a retail establishment, picketing is expected to accomplish most, if not all, of these purposes. In other situations, such as at a manufacturing plant which does not service consumers directly, refusal of employees of other employers to cross the picket line may be the principal result sought by the picketers.[2] In that way the struck employer is denied access to essential raw materials and is prevented from shipping his finished products.

Although picketing thus served a variety of purposes, and occurred at various sites, the mores and customs which emerged made no fine distinctions between them. Unions did not develop different rules to govern the conduct of their members depending on which employer and which purpose was involved. Rather the emphasis was on the vital necessity of observing a picket line as a means of achieving labor solidarity. A union member was expected to observe a lawful picket line at the premises of any employer and under all the above circumstances.

We submit that refusal of an employee, in the course of his employment, to cross a lawful picket line at premises of an employer other than his own is a traditional form of concerted activity. It is inseparable from, and as deeply rooted as the general duty which attaches to union membership, namely, respect for a lawful picket line.[3]

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[2] *Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334.

[3] In *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687, this Court said that it is "traditional and permissible in a primary strike" for pickets at a mill "to influence . . . employees of a customer of the mill not to cross the picket line." The Court of Appeals for the Ninth Circuit stated: "The reluctance of workers to cross a picket line is notorious." *Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334. The court below stated: "Such refusal to cross a picket line is habitual with union workers as this court has recently pointed out, it is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense directed to mutual aid or cooperation" (R. 75). The opinion cited *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (1951) and *NLRB* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503, 505-6 (1942).

As the Board has shown,[4] it is precisely these forms of traditional concerted activities which were unprotected under *Duplex* v. *Deering*,[5] and which Congress must have intended to protect, if it intended to protect anything, in the Norris-LaGuardia Act and the Wagner Act. While the Taft-Hartley Act placed certain curbs on these traditional activities, particularly as concerns their impact on secondary employers, it excepted from these curbs the type of concerted activity involved in this case. Consequently, this activity must be deemed to have the same protected status today that it had under the Wagner Act.[6]

The Legislative History of Section 7 of the Amended Act Demonstrates that the Concerted Activity Here Involved Is Protected.

The clear import of the language of section 2(3) and (9) and section 7 is that refusal of an employee to cross a primary picket line is protected concerted activity.[7] Our conclusion is affirmed by the legislative history of the Taft-Hartley Act concerning the rights of employees under section 7. This history shows that elaborate consideration was given to the scope of protection under section 7 and that Congress outlined clearly the very limited types of concerted activity which it desired to render unprotected. We shall show that only those unusual concerted activities which are unlawful or which are repugnant to the fundamental policies of the National Labor Relations Act, fall into this nonprotected category.

The bill which initially passed the House dealt with this question directly in section 7. This section in the House bill specifically excepted from protection concerted activities "not constituting unfair labor practices under section 8(b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements."[8]

By these provisions the House aimed to preclude repetition of certain early decisions of the Board which held, according

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[4] See Petitioner's brief, pp. 28-35.
[5] *Duplex Printing Co.* v. *Deering*, 254 U. S. 443 (1920).
[6] See Petitioner's brief, pp. 35-45.
[7] *Id.* at 17-28.
[8] H. R. 3020, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 176.

to the House, "that the language of section 7 protected concerted activities regardless of their nature or objectives." [9] The House was referring to cases where protection was given by the Board to sitdown strikers,[10] to employees whose concerted activity technically constituted mutiny,[11] and to mass picketers who forcibly prevented other employees from entering the plant.[12]

It was recognized by the House that these types of conduct, which were unlawful under federal or state law, previously had been removed from protected status by the courts. In addition, the House noted that the Board's later decisions followed the principles established by the courts to the effect that under section 7 "employees are not given any right to engage in unlawful or other improper conduct." [13] Thus, the Board had removed protection from strikers who sought to compel employers to violate the National Labor Relations. Act,[14] or the federal wage stabilization laws,[15] or who struck in violation of collective bargaining agreements.[16] Striking an employer while refusing to bargain with him was also held by the Board to be outside the ambit of protected concerted activity.[17]

While these court and Board decisions had established principles which the House deemed salutary, they were still only decisions, and the House felt impelled to write these principles into section 7 so as to preclude a change of heart by the courts or the Board.

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[9] H. R. Rep. No. 510, 80th Cong., 1st Sess. 38 (1947), 1 Leg. Hist. 542.
[10] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).
[11] *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31 (1942).
[12] *Indiana Desk Co.* v. *NLRB*, 149 F. 2d 987 (1944).
[13] H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-9 (1947), 1 Leg. Hist. 542-3.
[14] *Thompson Produets, Inc.*, 72 NLRB 886 (1947).
[15] *American News Co., Inc.*, 55 NLRB 1302 (1944).
[16] *Scullin Steel Co.*, 65 NLRB 1294 (1946).
[17] It is important to note that at least some of these concerted activities, such as refusal to bargain during a strike, were not unlawful under federal or state law prior to the Taft-Hartley Act. However, such activities were considered to be in derogation of the policies of the Act and therefore were labeled "improper." Since such activities, while not technically unlawful, undercut the fundamental policies of the Act itself, they could not be dignified with a protected status under the Act just as unlawful activities could not be so dignified. These are the types of concerted activity which the House unquestionably had in mind when it alluded to the removal by the courts of protection from "other improper conduct" as well as from strictly "unlawful" conduct.

In the bill which passed the Senate, section 7 was left unchanged from the original Act.[18] The Senate appeared to be in agreement with the court-established principles, but it apparently felt that the best way to continue to permit these principles to govern the types of concerted activity to be protected by section 7 was to leave section 7 unchanged.

The Report of the Committee of Conference indicates that there was concern in the Committee that enumeration of specific types of unlawful or improper concerted activities in section 7 might result in the omission of other types of such conduct.[19] This would leave the latter protected despite the obvious intent of Congress to deny them protection.

There was good reason indeed for such concern. For example, it is our view that the technically mutinous conduct in the *Southern Steamship*[20] case probably was not encompassed by the House bill's formulation of the specific concerted activities to be excepted from protection under section 7. Broad scope was given to the terms "unfair labor practices under section 8(b)" and "unlawful concerted activities under Section 12" in the House bill, but we do not believe that such conduct was embraced by either term.

The Senate view prevailed in the Committee of Conference as explained in the following excerpt from the Conference Report:

> "By reason of the foregoing court and Board decisions, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make *improper* conduct not specifically mentioned subject to the protection of the Act." (Emphasis added.) [21]

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[18] H.R. 3020, 80th Cong., 1st Sess., as passed Senate (1947), 1 Leg. Hist. 236-7.

[19] H.R. Rep. No. 510, 80th Cong., 1st Sess. 39 (1947), 1 Leg. Hist. 543.

[20] See footnote 11.

[21] It will be noted that the word "improper" in the above quotation clearly was meant to embrace unlawful conduct (such as mutiny in the *Southern Steamship* case) which might not have been excluded from protection by the House version of section 7. It may be inferred that the word also was meant to embrace conduct which, while not unlaw-

Having followed the Senate's approach and eliminated the specific exceptions which the House placed in section 7, the Committee of Conference nevertheless deemed it necessary to refer to other parts of the conference agreement to demonstrate its intent to remove protection from "improper" concerted activities. (Here again, as the following quotation demonstrates, this word was used primarily to refer to activities which were made unlawful—unfair labor practices—for the first time by the conference agreement.) Referring to the declaration of policy in the amended Act, the Conference Report said:

> ". . . it is stated in the new paragraph dealing with *improper* practices of labor organizations . . . that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that the undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible." (Emphasis added.) [20]

Great pains thus were taken to make it clear that Congress intended to remove protection from the "improper practices" even though they were expressly made unlawful as unfair labor practices under the Act. It was thought necessary to say this despite the fact that the principles enunciated in the court decisions which were cited and approved in the Conference Report would have made such a conclusion virtually inescapable.

In view of the great care which Congress exercised to indicate its intent to remove protection from unfair labor practices ("improper practices"), it is reasonable to assume that Congress would have given us at least some indication of any intent it may have had to remove protection from lawful concerted activity of the kind involved in the instant case.

Particularly is this so here since the established and uniform policy of the Board was to accord protection to employees who

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ful, is incompatible with the policies of the Act; e.g. unauthorized or wildcat strikes. See cases cited in 62 Yale L. J. 92, 94, n. 17 (1952); 59 Harv. L. Rev. 747, 753-5 (1946). But it is evident from the Conference Report discussion of court and Board cases referred to above that no broader meaning may be ascribed to the use of the word "improper."

[20] See footnote 19.

refused to cross primary picket lines. Moreover, this policy was approved by the courts.[28] However, we have been unable to find any indication of such intent either in the statute or the legislative history.

We believe it plain from the foregoing that Congress did not intend to remove protection from concerted activities which are neither unlawful nor in conflict with the basic policies of the Act. This conclusion must follow in light of the detailed Congressional consideration of the scope of protection under section 7; the particularity with which unlawful conduct was stated to be nonprotected; and the lack of any indication at all as to an intent to remove protection from concerted activities which are lawful and not violative of the policies of the Act, except as expressly provided for in the statute itself. (See discussion of section 9(c)(3) below.)

More important for purposes of the instant case, we believe it is even plainer that Congress did not intend to impose a nonprotected status on concerted activity which it expressly recognized as lawful. Such conduct cannot be denominated as against the policies of the Act or against public policy. If it is neither unlawful nor against public policy, it cannot be denominated "improper" either, as that term was used by Congress. Accordingly, we are constrained to conclude that such conduct must be accorded protection under section 7.

We submit that the proviso to section 8(b)(4) falls squarely into this category of lawful conduct. The proviso expressly recognizes refusal to cross a primary picket line as lawful. This can only be taken as an expression by Congress that such conduct is in accordance with the public policy and is protected under section 7.

The Express Removal of Rights from Certain Employees Under Section 8(d) and Section 9(c)(3) Reenforces the Conclusion That Congress Intended No Removal of Rights from Employees Who Refuse to Cross a Lawful Picket Line

A. Section 8(d)

The treatment prescribed by section 8(d) for employees who engage in a strike within the 60-day "cooling-off" period fur-

[28] See *Cyril de Cordova & Bro.*, 91 NLRB 1121 (1950) and cases cited therein at 1134-39.

nishes additional evidence that Congress must have intended to accord protected status to participants in the instant concerted activity of refusal to cross a picket line. A contrary interpretation would lead to the anomalous result of employees who engage in expressly illegal concerted activity being accorded more favorable treatment than employees who engage in expressly legal concerted activity. Such an intent cannot be imputed to Congress, and assuredly not in the absence of an expression to this effect in the language of the statute.

Section 8(d) defines the words "bargain collectively." (Refusal of an employer or a union to bargain collectively, of course, is an unfair labor practice under section 8(a)(5) and 8(b)(3), respectively.) Among other things, section 8(d) requires either party to a collective bargaining contract which is due to terminate to serve the other party with a 60 days' written notice of a desire to terminate or modify the contract. During this 60-day "cooling-off" period the parties are required to negotiate and to notify federal and state mediation agencies of the existence of a dispute. Finally, the parties are required, during the cooling-off period, to continue all the terms and conditions of the existing contract in full force and effect without resorting to strike or lock-out.

Violation by a union of this no-strike obligation constitutes, we presume, an unfair labor practice under section 8(b)(3) since abstinence from strike action during the 60-day period is part of the obligation to bargain collectively provided for in that section. The last sentence of section 8(d) sets forth the penalty which is imposed on employees who violate the proscription on strikes during the cooling-off period. This sentence follows:

> "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

By being deprived of his "status as an employee" the employee

loses his protection under section 7 and becomes subject to immediate discharge by the employer, whether or not his position has been filled by a permanent replacement. At this stage the employee is in the same posture as an employee who participates in any other form of concerted activity which is denominated an unfair labor practice under section 8(b), or is otherwise unlawful or against the basic policies of the Act.

However, as concerns rights upon reemployment, Congress accorded violators of the section 8(d) no-strike provision somewhat more favorable treatment than employees who engage in other "improper" conduct. Any of the latter employees who are discharged and are then reemployed by the same employer have only the status of new employees. It is as if they are being hired for the first time. Reemployment of the former employees who may have been discharged, on the other hand, results in the termination of their loss of status as employees, as set forth in the quoted provision from section 8(d). This means that they are restored to the employee rights which they held prior to their discharge. Reemployment of either category of employees, of course, is within the exclusive discretion of the employer. (It is interesting to note that although Congress saw fit to make a rather fine distinction in the penalties for these forms of illegal conduct, the court below described the far more important distinction between replacement and discharge of economic strikers as "wholly unrealistic" (R. 78).)

Thus both categories of employees lose their protected status for engaging in concerted activities which are expressly made unfair labor practices under 8(b), except that violators of section 8(d) have their old rights restored upon reemployment. It would seem that this differentiation in the penalties visited on the two groups of employees is the reason for the express specification of the penalty in section 8(d). If Congress had wanted to impose the same penalty on violators of section 8(d) as on participants in other unfair labor practices, it would have said nothing in line with its scheme of relying on the legislative history as evidence of its intent to remove protection from participants in unfair labor practice conduct. The great care which Congress thus took to establish fine degrees of penal-

ties for different types of *unlawful* conduct indicates the importance which Congress placed on deprivation of rights under section 7. Surely Congress would have been no less specific concerning deprivation of rights for *lawful* and proper conduct if that had been its intent.

Contrast, however, the treatment of the concerted activity referred to in the section 8(b)(4) proviso. That activity, of course, is not unlawful under federal or applicable state law. On the contrary, it is expressly recognized as lawful and proper. Yet there is no provision in the Act about removal of any rights for engaging in such activity. We can only conclude, therefore, that Congress did not intend to deprive employees of rights for refusal to cross a lawful picket line.

But even more striking in this context is the fact that the court below imputed to Congress an intent to treat violators of section 8(d) more favorably than participants in the concerted activity expressly sanctioned and recognized as lawful by the section 8(b)(4) proviso. The court below said the latter lost their employee status under section 7, whereas, under section 8(d), the former would have lost such status subject to possible restoration without loss of prior employee rights.

We cannot believe that Congress intended such a weird result in the absence of a clear expression to this effect. Neither can we believe that Congress intended to impose any penalties at all on employees who act in accordance with the proviso, let alone the same penalties that are imposed on participants in illegal conduct other than violation of section 8(d). If any penalties at all had been intended for engaging in conduct sanctioned by the proviso, logically they would have been less than the full deprivation of rights decreed by the court below, or the more limited degree of deprivation under section 8(d).

We submit that Congress would have acted expressly if it had desired to remove any rights, other than those which are removed by other provisions of the Act. (See below.) The absence of any expression at all in this regard is proof of an intent to continue the protected status of the conduct sanctioned by the section 8(b)(4) proviso.

B. **Section 9(c)(3)**

The express removal of certain rights from lawful strikers

in section 9(c)(3) furnishes additional support for our position. This section indicates that, when Congress desired to remove certain protections from participants in concerted activities which are recognized by the Act as *lawful*, it did so directly and expressly in the Act itself. Manifestly, Congress would have followed the same course as concerns the activity which is recognized as lawful by the section 8(b)(4) proviso, if that had been its intention.

Section 9(c)(3) provides, in part, as follows:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

This provision was aimed principally at the voting rights which economic strikers who had been permanently replaced enjoyed under the Wagner Act. It was well settled under the Wagner Act that economic strikers (those engaged in a lawful strike for improved terms and conditions of employment) were not entitled to reinstatement in their jobs if they had been permanently replaced.[24] However, in representation elections conducted by the Board in its early years, the economic strikers were permitted to vote and their permanent replacements were ineligible to vote.[25] In subsequent rulings, the Board held that permanent replacements as well as economic strikers might vote.[26]

Congress took cognizance of this rule of the Board, disagreed with it, and included the above provision in section 9(c)(3) to remove the right to vote from employees (economic strikers) engaged in lawful concerted activity, but who are not entitled to reinstatement because they have been permanently replaced.[27] (Strikers who cease work to protest employer unfair labor practices and strikers who have not been permanently replaced, of course, retain the right to vote.)

We have seen that, with respect to the concerted activity of refusal to cross a picket line, the courts and the Board regularly have held that it was protected under section 7.[28] We are

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[24] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938).
[25] *A. Sartorious & Co.*, 9 NLRB 19 (1937).
[26] *The Rudolph Wurlitzer Company*, 41 NLRB 1074 (1942).
[27] S. Rep. No. 105, 80th Cong., 1st Sess. 25, 1 Leg. Hist. 431. A modified version of the provision in the Senate bill became part of the final statute.
[28] See footnote 23.

constrained to believe that Congress approved this line of decisions because of the careful manner in which it safeguarded this activity from any possible taint or inference of illegality by enacting the section 8(b)(4) proviso.

It therefore stretches credulity to assert that Congress intended, in these circumstances and without any statutory expression thereof, to remove any rights from employees who engage in the activity approved by the proviso. Of course, if employees who refuse to cross a picket line at another employer's premises have been permanently replaced by their own employer, they would be disqualified from voting under section 9(c)(3). According to the Board, such employees would not be entitled to reinstatement and would be covered by this section. But that is the sole penalty provided in the statute for engaging in such lawful activity. It is clear that Congress intended no other penalty in this situation.

Principles Established by the Courts and the Board Require Reversal of the Decision of the Court Below

Under well settled doctrine, conduct which clearly falls within the plain language of the statute raises a strong presumption that Congress intended such conduct to be covered by the statute. Only in rare and unusual circumstances might there be any warrant for rebutting such a presumption.

In the instant case, there can be little doubt that the refusal to cross the picket line is encompassed by the plain language of section 7 when read in conjunction with section 2(3) and (9).[20] Indeed, the court below so held (R. 75). Consequently the presumption requires that the employee who engaged in the conduct be protected, unless there is a showing of exceptional circumstances to rebut the presumption. We shall see, however, that no such circumstances are present in this case.

As we have shown in our discussion of section 7, the only rare and unusual circumstances which Congress indicated might justify denial of protection are those where the employees are engaged in "unlawful or other improper conduct." We have also shown that the quoted words were narrowly lim-

[20] See Petitioner's brief, pp. 17-24.

ited to cover conduct (a) which is unlawful under the Act, or under other federal or state laws not in conflict with the Act and (b) which, while not unlawful, is in contravention of the policies of the Act. In particular, Congress did not intend to remove protection from the normal and traditional types of union concerted activities which do not fall within (a) or (b), except to the extent that such protection is expressly removed by provisions of the statute itself.

We are not alone in our views as to the limited nature of the exceptions which may be made from the basic presumption that concerted activities are protected. The criteria of "lawful" and "unlawful" conduct recently were applied by the Court of Appeals for the District of Columbia in the *Jefferson Broadcasting* case.[30] Judge Bazelon, speaking for a unanimous court and emphasizing a prior opinion by Judge Learned Hand, summarized the criteria as follows at 31 LRRM 2094:

> "Protection under section 7 of the Act, then, is withdrawn only from those concerted activities which contravene either (a) specific provisions of basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute. The Supreme Court has indicated that '[t]he conduct this protected is lawful conduct.'[31] And Judge Learned Hand, in a case involving a union publication which severely criticized the employer's business dealings, said: '[S]o long as the activity is not unlawful, we can see no justification for making it the occasion for a discharge . . .'[32] More recently the Board in the Hoover Co. case reiterated the correct rule when it declared that it is 'not free . . . to measure concerted ac-

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[30] *Local Union No. 1229, International Brotherhood of Electrical Workers* v. *NLRB* (Jefferson Standard Broadcasting Company), No. 11235, 31 LRRM 2093, 2094 (Nov. 20, 1952). In this case certain employees were discharged during contract negotiations for distributing handbills which criticized their employer's television programs. The court held that the employees were not properly discharged unless it is determined by the Board that distribution of the handbills constituted unlawful conduct.

[31] The opinion cites *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 255 (1939).

[32] The opinion cites *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 506 (1942).

tivity in terms of whether the conduct is wise or fair or satisfies standards which we think desirable.' " [33]

When the concerted activity involved herein is evaluated in terms of these criteria, it becomes crystal clear that the presumption must prevail. The refusal to cross the picket line concededly was lawful. Moreover, it cannot be said that the refusal contravened the policies of the Act since the proviso to section 8(b)(4) expressly safeguards and approves such conduct. Accordingly the court below erred in denying protection to the employee who resorted to his rights under section 7.

The majority in the court below, unfortunately, did not rely on these criteria. It relied instead on cases which conflict with these criteria or are not applicable to the facts of this case.

The Republic Aviation Case. Principal reliance was placed on the *Republic Aviation* case [34] which forbade solicitation of union members on company property during working hours. There is no conflict between the *Republic Aviation* case and the foregoing criteria since the decision left the employees sufficient latitude to enable them to carry out the functions of that activity on company property, but on their own time. The concerted activity thus was substantially protected and interference with the employer's right to enforce reasonable discipline during working hours was kept at a minimum.

The bother with the *Republic Aviation* case is that it was misapplied to the facts of the instant case. Solicitation of union members cannot be equated with refusal to cross a picket line. While they are both forms of union concerted activities, the nature of the latter requires that it be exercised on the employer's time or not at all. There is thus presented an irreconcilable conflict between the statutory right to engage in concerted activities and the employer's right of discipline. We submit that where such conflicting rights cannot be effectively accommodated, the statutory right must take precedence over the employer's right.

The "Partial Strike" Cases. The court below also relied on

[33] The opinion cites *The Hoover Co.*, 90 NLRB 1614, 1621 (1950).
[34] *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1944).

the so-called "partial strike" cases,[8] none of which were passed upon by this Court. These cases, however, are at war with the reasoning of the opinion below, with section 13 of the Act, and with the criteria set out above.

Under the reasoning of the leading *Conn* case, which involved the refusal of employees to work overtime hours without premium pay, rights guaranteed by section 7 might be denied to any concerted activity which does not constitute a total and sustained stoppage of work. Yet, the court below expressly held that the "partial strike" activity here involved is a right guaranteed by section 7 (R. 75).

More important, however, is the failure of the court below to recognize that the *Conn* case is in direct conflict with section 13, as amplified by section 501(2), of the Act.

Section 13 provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations on that right."

Section 501(2) provides:

> "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

If the only type of strike activity which can qualify for protection under the *Conn* case is a total strike, the language of section 501(2) is rendered meaningless. We believe it is clear, however, that these statutory provisions cover more than just total strikes, and that they nullify completely the rule of the *Conn* case.

Finally, the concerted activity involved in the *Conn* case

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[8] *C. G. Conn, Ltd.* v. *NLRB*, 108 F. 2d 390, 397 (1939); *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496 (1946); *NLRB* v. *Kopman Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108 (1947). The refusal to work in the *Kopman* case does not appear to have been part of any concerted activity which makes that case inapposite to the facts of the instant case. Compare the *Conn* case with *Rapid Roller Co.* v. *NLRB*, 126 F. 2d 452, 460-1 C. A. 7), certiorari denied, 317 U. S. 650, discussed in Petitioner's brief, pp. 50-60.

would be protected under the criteria approved by Congress and other courts for interpreting section 7. Admittedly, refusal to work overtime is lawful in the absence of contrary obligations in a collective bargaining contract.

In addition we confess an inability to perceive how such refusal contravenes the policies of the Act any more than a total strike which, of course, is protected. We are of the opinion that the *Conn* case doctrine can lead only to greater industrial unrest in numerous situations where a total strike is unnecessary to reach an amicable settlement of a dispute. Moreover, this doctrine works a hardship on weaker unions which may not be in a position to engage in total economic action.

Our analysis of the *Conn* case is equally applicable to the *Montgomery Ward*[*] case and other cases which have relied on the *Conn* case. We submit that the rule of these "partial strike" cases has been nullified by section 13 of the amended Act and by the Congressional criteria for interpreting section 7. Accordingly these cases are not valid precedents. Moreover, we wish to emphasize that the conduct involved in the instant case differs from th concerted activities involved in the "partial strike" cases. Hence the instant case should be decided on its own merits and on the basis of the criteria previously noted.

Comparison With Other Cases. There are, of course, a number of concerted activities which fall into the unprotected category under the proper criteria for interpreting section 7. The *Fansteel, Southern Steamship* and other cases mentioned earlier involved unusual and atypical concerted activities which either were unlawful or violative of the Act's policies. The

[*] *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486. In this case, the court upheld the discharge of employees who refused to work on goods emanating from a different plant of the same employer which was on strike. Contrast the views of Justices Brandeis and Holmes in their dissenting opinion in *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 481-2:

"May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? . . . Courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."

Briggs-Stratton case [11] also falls into this category. There the conduct was not unlawful. But it contravened the policy of the Act to foster collective bargaining since the union failed to state any demands while it carried out its intermittent work stoppages. Indeed such conduct might constitute a violation of section 8(b)(3) of the amended Act. As this Court said, in *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 459 (1950), "*Auto Workers* v. *Wisconsin Board* . . . was not concerned with a traditional, peaceful strike . . ." [12]

On the other hand, the conduct in the instant case is a usual and traditional form of concerted activity, as this Court, the court below and the Court of Appeals for the Ninth Circuit have recognized.[13] It is not unlawful or against the policies of the Act. In short it is not "improper" activity as that term was understood by Congress.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel,

ELLIOT BREDHOFF,
Assistant General Counsel.

CONGRESS OF INDUSTRIAL ORGANIZATIONS
718 Jackson Place, N. W.
Washington 6, D. C.

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[11] *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245 (1947). It should be noted that this case did not involve discharges of employees, and that this point was emphasized by this Court, at p. 250, in reaching its conclusion that the concerted activity there involved was not protected by the Act.

[12] See discussion of right to strike in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 655, 672-4 (1951).

[13] See footnote 3.